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CASES

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 513

BURNHAM CHEMICAL COMPANY, a corporation,
Petitioner,

vs.

BORAX CONSOLIDATED, LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION,
Respondents.

Brief of Respondents Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company in Opposition to Petition for Writ of Certiorari.

The petition fails to state or reveal the relevant facts of the case, much of what it does assert as fact is purely imaginative and quite unsupported in the record, and the questions of law which it seeks to raise are, in this case, entirely academic. Indeed, once the facts are fairly stated, there are no issues of law whatever. The decision of the court below is in full conformity with the decisions of this Court and does not conflict with any decision of any other Court of Appeals.

STATEMENT

The petition seeks to review a decision of the Court of Appeals (reported at 170 F.2d 569) unanimously affirming a judgment of the District Court which dismissed the action as barred by the statute of limitations. The suit was filed in July, 1945 and was an ordinary action at law to recover damages arising from alleged violation of the antitrust laws.

A. The Complaint, the Alleged Acts of Wrongdoing, and the Alleged Damage.

What the complaint charged was that the plaintiff had been damaged in two respects, and two only:

1. In 1924 and 1925—20 years before this suit was filed—respondents allegedly conspired to have the Post Office Department issue a "fraud order," preventing petitioner from using the mails. The fraud order was issued in June, 1925, with the effect of compelling petitioner to abandon the sale of packaged borax (R. 43-45, Complaint para. 73).

2. In 1928, respondents allegedly reduced the price of borax below petitioner's cost of production, in conspiracy, as a result of which petitioner was driven out of business entirely (R. 44-45, 47, Complaint paras. 73, 76). It is alleged that petitioner shut down in January, 1929 (R. 45, 47-48), 16 years before this suit was filed, and it was never thereafter in business (R. 400). Its operations had been entirely on property leased from the government under a mineral lease, and that lease was cancelled by the government for non-payment of rent eight years before this suit was filed (R. 610).

The petition asserts (p. 2) that after 1929 petitioner sought to get back into business but has been prevented by respondents. There is not a word in the record to support this assertion. *No overt act of respondents causing damage to petitioner is alleged in the complaint to have occurred after 1929, and this*

fact was conceded by petitioner (R. 242). The only act of petitioner that might be deemed an attempt to get back into the borax business was an effort to obtain from the government a mineral lease on a certain ore-body (the Little Placer), a wholly different property than its original lease. One of the respondents sought to obtain a patent to the same ore-body. However, the government denied petitioner's application for a lease so long ago as 1933 (R. 50), it also denied a patent to the respondent, and the ore-body still remains in the government's hands. Now petitioner not only did not claim that as a result of the government's denial of its application for a lease it sustained any damage for which respondents could be held liable, but it expressly disavowed any such claim. As noted in the opinion of the court below (R. 833):

> "* * * at the trial the court asked appellant's counsel what (overt) act of appellees occurring *after* 1929 resulted in damage to appellant, aside from the futile attempts to secure a Government lease on The Little Placer. Appellant's counsel responded that nothing else had occurred; that appellant did not allege any other incidents in its complaint and that it could prove no damage from The Little Placer incident."

B. The Special Trial on the Issue of the Statute of Limitations and the Findings Thereon of Both Courts Below.

The California *Code of Civil Procedure* contains the following provisions:

Sec. 335:

> "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

Sec. 338:

> "Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

Since the period of the statute of limitations in California is thus three years, respondents moved to dismiss the action on that ground. Petitioner sought to avoid the statute by claiming "fraudulent concealment" by respondents. Although respondents contended that the facts alleged did not in law constitute fraudulent concealment, the trial court preferred to hear whatever evidence petitioner had to offer on the subject. At petitioner's own suggestion (R. 226, 254-257), the court, under the authority of *R.C.P.*, Rule 42(b), ordered a separate trial of the issue of the statute of limitations before any trial of the merits and directed respondents to file special answers to set up the defense of the statute of limitations without answering the complaint generally (R. 185).

The petitioner would characterize respondents as if the charges of the complaint on the merits were true, asserting that those accusations were admitted because, forsooth, they were not denied. But the *only* issue framed and tried was the statute of limitations, so that petitioner's charges on the merits were neither admitted nor denied (so stated by trial court, R. 329). In response to the same kind of argument in the trial court, the judge said (R. 751):

> "It could be the most dastardly conspiracy that human ingenuity could devise and it still won't change the question here to be determined, and that is whether the plaintiff had knowledge of it."

After a trial of over a week, during which petitioner's president was confronted on cross-examination with a score and a half of writings by him throughout the years, the court decided the issue of fact against the petitioner.

Thus the bald fact is that the issue of fraudulent concealment was tried and was decided against petitioner *on the facts*. The utterly devastating character of the finding is shown by the following statement from the District Court's findings (R. 803) quoted in the opinion of the court below (R. 841-842):

> "* * * *All of the evidence shows both knowledge and good cause to believe* on the part of the plaintiff *during the period specified in the special inquiry, that its business had been damaged by acts of the defendants in violation of the Antitrust Laws.* * * * Statements in writing and under oath by the witness Burnham, who was the managing president of the plaintiff, commencing in 1925 and continuing throughout the years to 1940, show without dispute a continued awareness and knowledge of the plaintiff's cause of action set out in the complaint. Not only that, but these writings make continuous claim as to the responsibility of the defendants for the loss and damage caused to the plaintiff's business."

The court below, after reviewing the lengthy record, commented (R. 844) that the appellant's case had been given a "thorough examination at the hearing on the special issue" and said:

> "We think that this judgment of the court was rested not only upon cases which clearly sustain it but *it is also fortified by substantial and convincing evidence of such persuasive and controlling force as to compel its entry.*"

Thus the two courts below concurred in finding that ever since 1925 and 1928 petitioner had knowledge of its alleged cause of action against respondents.

The petition erroneously states that respondents "held themselves out" as competing corporations (p. 3), or that they conspired to conceal their conspiracy (p. 20). There is no allegation whatever in the complaint to any such effect, and on the facts all that the claim comes to is that respondents did not publicly cry "peccavimus" and announce that they had violated the law. Similarly, it is said in the petition (p. 3) that officials of respondents on inquiry by petitioner denied the existence of the alleged conspiracy. But the fact as found by both courts below is that the petitioner separately *accused* two of the

respondents of having conspired to drive it out of business, they then merely denied the accusation, and *petitioner did not believe the denials*. On these matters the trial court's finding (R. 803-804), quoted in the opinion of the Court of Appeals (R. 842-843), is this:

> "* * * There has been no evidence in the opinion of the court of any fraudulent representation or concealment by the defendants of the plaintiff's cause of action which deterred the plaintiff from timely presentation of its claim in this court. The so-called Zabriskie and Emlaw conversations do not by any stretch of the imagination go beyond denials of the plaintiff's claim. In no sense do they reach the stature of fraudulent representations or concealment of such an affirmative nature as to in law be misleading to the plaintiff. Moreover, *the evidence without dispute shows the plaintiff did not rely upon the statements made by these two men and hence there is no proof of any misleading character to be attributed to them.*"

In view of the concurring findings of the two courts below, no review of the evidence is necessary, but even a passing mention of some of the items in the large record reveals the utter hollowness of the petitioner's case.

In 1926 in litigation with the Postmaster in the United States District Court for Nevada the petitioner under oath charged that respondents had conspired in violation of the antitrust laws to drive it out of business and to that end had caused the postal fraud order to issue, accused respondents of constituting a monopoly, a "borax trust" and a conspiracy in restraint of trade, and called upon the government to prosecute respondents under the antitrust laws (R. 409-423, e.g., 419, 420). In 1930 petitioner reasserted these charges in the same litigation and added that the intervening price cuts of 1928 were part of the same scheme (R. 561-562, 567).

Following the price cuts petitioner consulted attorneys in late 1928, and, after studying the circumstances, they advised petitioner that it had a good case against respondents under the antitrust laws because the price cuts were designed for the express purpose of killing off competition. They added that any innocent explanations of the price cuts were mere "cloaks and disguises" (R. 510, 515, 518, 519). As petitioner, in 1939, 11 years later, wrote to the Assistant Attorney General in charge of the Antitrust Division, its attorneys had advised it in 1928 that it had "a case against the Trust for violating the Sherman Antitrust Laws," and at all times thereafter petitioner was "convinced" from the circumstances in which the price cuts occurred that they had been designed to drive it out of business, but petitioner had failed to sue at the time for extraneous reasons (R. 398-401). Ten years after this advice of counsel, in 1938, the petitioner again consulted an attorney, this time in New York, and was again advised that it had had a good case under the Sherman Act against respondents but that by 1938 the claim was barred by the statute of limitations (R. 615).

In 1934 petitioner was referring to respondents as "having established, continued and maintained an evil and strangling monopoly in the borax business" (R. 585) and was taking public credit for having "for six years * * * been defending the interests of the people of the United States against the illegal practices of the borax trust" (R. 603). In 1937 the petitioner was informing a Senate Committee that the respondents had driven it out of business by illegal conspiracy in 1928 (R. 593-594). In 1938 petitioner had prepared for its use a lengthy monograph as a history of its business entitled "People of the United States v. Foreign Owned Monopoly," wherein after summing up all the evidence, all facts and circumstances, it concluded that no stronger evidence was needed to establish petitioner's case against respondents: "What stronger evidence,"

it inquired, "would one want to show that the British Borax Trust itself was behind the various steps that have been taken to defeat the Burnham Chemical Co. * * *" (R. 678). In 1939 and 1940 in a series of letters to the Department of the Interior and the Antitrust Division the petitioner reviewed the circumstances of the price cuts, what preceded and what followed, pointed out why innocent explanations of the price cuts did not ring true, and urged that the evidence clearly demonstrated respondents' illegal conspiracy to drive petitioner out of business in 1928 (Cf. R. 618-621, 623-624, 633-634, 639-641). In 1940 petitioner boasted to its stockholders that ever since 1929 it had been publicly calling attention to the fact that foreign owned borax interests were monopolizing borax deposits and "driving out American competition" (R. 655) and expressed gratification that the Department of Justice was about to take action.

During all these years the reason that petitioner did not sue was that it preferred to use the funds made available to it by its stockholders for other purposes (Cf. R. 660-661). Meanwhile, numerous witnesses upon whom respondents would need to rely in meeting petitioner's charges on the merits had died (Cf. R. 537, 659).

C. Erroneous Assertions and Half Truths in the Petition.

To avoid the undisputed facts and the findings of the two courts below concerning its knowledge of its cause of action, the petitioner indulges in a considerable number of erroneous assertions and half truths. In addition to some already mentioned, we may briefly note others. Thus petitioner asserts (p. 3) that the evidence on which the complaint is based was not discovered until 1944 when, on seizure of one of the respondents by the Alien Property Custodian, a so-called master agreement and other documentary evidence was found in its files. This statement is purely imaginative, and neither allegation in

the complaint nor evidence in the record can be found to support it.

The petition further asserts that in 1944 the government instituted proceedings against respondents accusing them of violating the antitrust laws and therein referred to an alleged written agreement made in 1929 of which, says petitioner, it had no previous knowledge. While the complaint in the instant case does refer to the suits by the government in 1944, the 1929 agreement alleged by the government was one which the government averred was first made in November, 1929, i.e., nearly one year *after* the petitioner had already gone out of business; the government made no charges about any pre-existing conspiracy or wrongdoing. Thus, the agreement of November, 1929 was, if it existed at all, one having no relation whatever to petitioner's case (Cf. discussion at page 16 infra).

Furthermore, petitioner's complaint averred that the alleged agreement of November, 1929 was a mere reduction to writing of previous "understandings, combinations and conspiracies" (R. 36, Complaint para. 66). And of these alleged previous conspiracies petitioner, as we have seen, was for years convinced that it had sufficient proof.

Moreover, it need hardly be added that the suit by the government was a mere accusation; its allegations were no evidence of their truth, and the assertion in the petition (p. 8) that as a result of the government's suits an illegal agreement or conspiracy became a matter of public record is quite spurious. By the mere filing of the government's suits petitioner did not discover anything more than it had known, for the allegations are presumed to be untrue (Cf. observation of trial court, (R. 279); indeed, they were denied and have never been put to the test of trial.

ARGUMENT

Summary

The petition hardly claims that the Court of Appeals failed to apply the law as it now exists. Nor does it suggest that under the California statute of limitations its claim is not barred. What petitioner asks this Court to do is to declare new law.

Thus the petition states (p. 14) that the issue is whether "a private action, asserting a federal right based upon the antitrust laws [is] to be defeated by a literal application of a state statute of limitations." Petitioner does not make clear whether it asks this Court to abrogate entirely the settled rule that state statutes of limitations apply to actions at law on federally created rights where no federal statute of limitations exists, or whether it would only abrogate that rule in antitrust actions, and, if the latter, on what it would base the distinction. Nor does it make clear whether it would have this Court sweep away the state statutes of limitations entirely in private antitrust actions, thereby leaving such actions, alone of all suits on federal rights, wholly free of any statute of limitations, or whether it would only modify the normal application of the state statutes in some respects, and, if the latter, to what extent.

Moreover, petitioner asks this Court to declare new law in respects that can have no possible effect on the outcome of this particular case.

It is elementary that concurring findings of two lower courts are final and will not be reviewed by this Court. *Comstock v. Group of Investors,* 335 U.S. 211, 214; *United States v. Dickinson,* 331 U.S. 745, 751. Petitioner is thus barred by the finding that ever since 1928 it not only had good cause to know but in fact knew of its alleged cause of action against respondents. And petitioner therefore does not indeed assail the finding (except by sly and covert suggestion). In view of this finding, the issues of law that petitioner would raise are all moot.

I. The State Statute of Limitations Applies to Private Suits Under the Antitrust Laws, but Whether the State Law Be Applied, or Some Newly Created Federal Rule of Fraudulent Concealment, the Petitioner's Case Is Barred.

For 43 years, since the decision of this Court announced by Mr. Justice Holmes in *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), it has been the law that in suits for treble damages under the antitrust laws the state statute of limitations applies, since Congress itself has prescribed no period of limitations and since the action is purely one at law for damages.[1] This rule, that the state statute of limitations governs, has been applied without deviation in every circuit where the question has arisen. Cf. *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9 Cir.), cer. den. 299 U.S. 613; *State of Oklahoma v. American Book Company*, 144 F.2d 585 (10 Cir.); *Momand v. Universal Film Exchange*, 43 F. Supp. 996 (comprehensive analysis by Wyzanski, J.); *Seaboard Terminals Corp. v. Standard Oil Co.*, 104 F.2d 659 (2 Cir.); *Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1 (3 Cir.); *Williamson v. Columbia Corp.*, 110 F.2d 15 (3 Cir.), cer. den. 310 U.S. 639.

Only recently the rule has twice been recognized by this Court, once in *Holmberg v. Armbrecht*, 327 U.S. 392 and again in *Cope v. Anderson*, 331 U.S. 461, 466. The *Holmberg* case is cited by petitioner; yet there this Court (at p. 395) reasserted the rule that state statutes of limitations govern in actions at law brought on federally created rights and cited the *Chattanooga* case, supra, as a leading example of that very rule; and in *Cope v. Anderson* this Court cited, to the same effect, the *Chattanooga* case, the *Seaboard* case, supra, and the *Bluefields* case, supra, all antitrust cases.

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1. The action in its very nature, as well as its form, is strictly at law. Holmes, J. in *Fleitmann v. Welsbach Co.*, 240 U.S. 27, cited with approval in *Mercoid Corporation v. Mid-Continent Co.*, 320 U.S. 661, 671; *Meeker v. Lehigh Valley Railroad Co.*, 162 Fed. 354; *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79, 87 (2 Cir.).

Petitioner now asks that this rule be abrogated and that this Court prescribe its own statute of limitations to apply uniformly throughout the country. The fact that for 43 years Congress has contentedly accepted the *Chattanooga* rule makes all the more applicable to antitrust cases the principle (*Holmberg v. Armbrecht,* supra) that in actions at law the silence of Congress is equivalent to a direct pronouncement that it is federal policy to adopt the state statute of limitations. Indeed, the *Clayton Act* in 1914 necessarily recognized the application of state statutes of limitations, when in Section 5 (15 *U.S.C.,* Sec. 16) it provided for suspension of the statute of limitations in certain circumstances, there being no statute of limitations to suspend if not the state statutes. And, if a uniform statute of limitations is now desirable, Congress is fully capable of prescribing one, and it is to Congress and not to the Court that the appeal should be made.

But the utter pointlessness of petitioner's argument is made evident by a simple inquiry. What rule of limitations would it have this Court announce as a federal rule? Apparently the petitioner seeks a rule that would toll the running of the statute of limitations during any period of "fraudulent concealment." But petitioner's case was tested by exactly such a rule. By judicial decision all California statutes of limitations are tolled by fraudulent concealment, whatever the cause of action and whatever the statute and without express provision to that effect in the statute.[2] *Kimball v. Pacific Gas & Electric Co.,* 220 Cal. 203, 30 Pac.2d 39. It was for precisely this reason that the petitioner was given a trial on this very issue, and it was found that there was no fraudulent concealment.

Consequently, it can make no difference to the petitioner's

2. The petition (p. 14) asserts that the court below held that the statute of limitations cannot be tolled for "fraudulent concealment." How petitioner could make so violently erroneous a statement is incomprehensible.

case whether the California statute of limitations or some new purported federal rule is applied. In short, the petitioner is asking this Court to issue what could be nothing more than an advisory opinion since it could not possibly alter the result in the case in hand.

II. A Private Suit for Treble Damages for Violation of the Anti-trust Laws Is Not an Action for Fraud, but Even Under the Statute of Limitations Applicable to Actions for Fraud the Petitioner's Case Is Barred.

Perhaps petitioner goes further and asks not only that the state statute of limitations be ignored and a federal rule created but also that the federal rule should be the one applied in most jurisdictions to actions for fraud, i.e., the rule that the period of limitations does not begin to run until "discovery" by the plaintiff, even though defendant has been guilty of no acts of fraudulent concealment.[3]

In this connection petitioner cites *Bailey v. Glover,* 21 Wall. 342. The case is not in point. The cause of action there, as here, arose under a federal statute, but, unlike the Sherman Act which does not prescribe its own period of limitations, there the federal statute contained its own statute of limitations. This Court merely held that every federal statute of limitations is to be read as including a provision that, if the cause of action is based on fraud, it does not accrue until discovery. As noted in *Bailey v. Glover* itself, the rule of that case has no application to an action at law under a federal statute not containing its own period of limitations and with respect to which the state statutes therefore apply.

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3. If this is petitioner's claim, it is contrary to the position taken by it in the District Court where it conceded that an action for damages under the Sherman Act is not an action for fraud (R. 795) and informed the court that the statute of limitations had run unless petitioner was able to prove as an "excusatory fact" its claim of fraudulent concealment (R. 267, 306).

Moreover, resort to *Bailey v. Glover* is not necessary to find the "discovery" rule for actions based on fraud. Under express statutory provision in California (*Code of Civil Procedure*, Sec. 338(4)), in "an action for relief on the ground of fraud," "the cause of action * * * [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." But this statute applies only where fraud is the gravamen of the action. *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203, 30 Pac.2d 39. It has been universally held, without exception, that the gravamen of an antitrust action for damages is not fraud, and that it is not governed by the statute of limitations applicable to suits for fraud. *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9 Cir.), cer. den. 299 U.S. 613; *State of Oklahoma v. American Book Company*, 144 F.2d 585 (10 Cir.); *Strout v. United Shoe Machinery Co.*, 208 Fed. 646. And this is so on principle as well as on unanimous authority. Obviously, not every actionable wrong is a fraud; yet the kind of reasoning used in the petition (p. 19) would make it so. An antitrust conspiracy is a wrong under federal law only because the liability is created by statute (Cf. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497), and thus it fits precisely into the category described by Section 338(1) of the California *Code of Civil Procedure*, which provides three years for "an action upon a liability created by statute, other than a penalty or forfeiture."

But apart from all this, here again petitioner's contention is, on the facts of the present case, wholly pointless, even were it to be assumed that the "discovery" rule applies. It is elementary under both federal and state decisions that something less than "knowledge" is sufficient to constitute "discovery." Cf. *Wood v. Carpenter*, 101 U.S. 135; *Teall v. Schroder*, 158 U.S. 172, 178; *Lady Washington Consolidated Co. v. Wood*, 113 Cal. 482, 45 Pac. 809; *Vertex Investment Co. v. Schwabacher*, 57 C.A.2d 406, 134 Pac.2d 891; *Neff v. New York Life Ins. Co.*, 30 Cal.2d 165, 180 Pac.2d 900; *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670

(9 Cir.), cer. den. 299 U.S. 604; *Jones v. Bankers Life Co.*, 131 F.2d 989, 994 (4 Cir.); *Sacramento Suburban Fruit Lands Co. v. Johnson*, 36 F.2d 935 (9 Cir.).

Yet here, as found by both courts below, petitioner had more than "discovery" as far back as 1928. It not only had good cause to know but in fact it had knowledge of its alleged cause of action throughout all the years since that time.

Petitioner cites *American Tobacco Co. v. People's Tobacco Co.*, 204 Fed. 58 (5 Cir.), a decision wholly destructive of its case. That was an antitrust case which arose and was tried in Louisiana. The court did not apply some federal rule of limitations but the Louisiana law of "prescription," that being the term used in the civil law which prevails in that state. Under that law, prescription apparently never begins to run in any case until the plaintiff knows of his cause of action, unlike the rule in common law jurisdictions where in suits other than for fraud or mistake the statute begins to run regardless of the plaintiff's knowledge, absent fraudulent concealment.[4] Yet even under the Louisiana rule as applied in the *American Tobacco* case, the petitioner here would be barred. The court there approved an instruction (at p. 60) that

> "it is a question of fact for you to determine, in connection with this case, whether or not the plaintiff knew, or ought to have known, more than a year before this petition was filed, that he had suffered an actionable injury."

Here both courts below have found that petitioner not only had good cause to know—i.e., "ought to have known"—but that in fact it did have knowledge of its cause of action ever since 1928. And petitioner itself concedes (p. 4) that it had "good reason to believe" that it had a cause of action.

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4. Cf. *Rose v. Dunk-Harbison Co.*, 7 C.A.2d 502, 46 Pac.2d 242; *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545; *Scafidi v. Western Loan & Building Co.*, 72 C.A.2d 550, 165 Pac.2d 260; *Neff v. New York Life Ins. Co.*, supra.

All that petitioner really means, when it claims that it did not have "discovery," is that it did not know of some hypothetical specific item of evidence. Here again the contention is not only without fragment of merit in law but, even were the law otherwise, on the facts of this case the petitioner would still be barred. The specific item of evidence referred to is an alleged written agreement, but, as we have seen (p. 9, supra), this hypothetical document is one alleged to have been executed in November, 1929, nearly one year after petitioner's alleged cause of action had already accrued. The fantastic nature of petitioner's claim in this connection was well revealed in its brief before the court below, where it said (p. 22):

> "Furthermore, actual knowledge by a wronged party that the acts of defendants as charged in a complaint were in themselves performed and carried out in violation of the Anti-Trust laws does not constitute proof of a conspiracy formed *after* the occurrence of such acts and on which conspiracy the action is solely based." [Italics are petitioner's]

Thus petitioner affirmatively asserted that it always knew that the acts which caused damage to it were in violation of the anti-trust laws, but it sought to escape the statute of limitations on the ground that it did not know of a *later* conspiracy formed after those acts were committed and for which it has no right to recover since no acts were done thereunder to its damage.

Apart from the fact just noted, the very case cited by petitioner, *American Tobacco Co. v. People's Tobacco Co.*, 204 Fed. 58, itself disposes of the contention that one does not have "discovery" until he knows of all items of evidence. The court there approved an instruction that

> "from the moment he knew he could bring an action against somebody to recover his damages, *although he might not have known who the person was, or he might not have known how he was going to prove his action,* prescription would run * * *" (p. 60).

It is elementary, too, that in order to prove a conspiracy a specific agreement need not be shown (*American Tobacco Company v. United States,* 147 F.2d 93, aff'd 328 U.S. 781) and necessarily, as the trial court said (R. 783), it has never been held that in order to show that a person has knowledge of a conspiracy it must be shown that he knew of a specific written agreement. Moreover, here, the supposed agreement was alleged to be a mere reduction to written form, after petitioner's cause of action had accrued, of the very conspiracy of which it already knew before the writing came into existence! (See p. 9, supra.)

"Discovery" does not mean that plaintiff must have his evidence all "sewed up" before he sues. A party convinced or believing that he has a cause of action must bring suit within the statutory period, and he then may utilize the various discovery procedures—interrogatories, depositions, subpoenaes, inspections, etc. Cf. *Scafidi v. Western Loan & Building Co.,* 72 C.A.2d 550, 570, 165 Pac.2d 260, 272; *Fidelity & Casualty Co. of New York v. Jasper Furniture Co.,* 117 N.E. 258, 186 Ind. 566; *Texas Rice Lands Co. v. McFaddin, etc. Co.,* 265 S.W. 888, 890 (Tex.). It is a rare case indeed where a plaintiff, when he starts suit, "knows enough about his cause of action to establish it forthwith by competent evidence." *Bowles v. Pure Oil Co.,* 5 F.R.D. 300. Yet here petitioner was convinced for years that it had all the evidence that was necessary.

In the last analysis, the essence of the petition is really this contention: Despite petitioner's complete conviction throughout the years that it had a case against respondents and despite its possession throughout all that time of both good cause to believe and of knowledge, nevertheless it had a right to defer suit until the government should see fit to assume the burden and expense of breaking trail for it. Of this argument the trial court said (R. 805) and the Court of Appeals quoted with approval (R. 843):

"* * * However, the law does not excuse an untimely presentation upon the ground that the party asserting the claim has been unable to obtain others to aid in the presentation of the claim. The burden of presenting an asserted claim in a legal proceeding always rests upon the party who has and asserts it, and he may not excuse untimely presentation because he has been unable to enlist the aid of others in order to bring about adjudication in the court of his claim."

III. The Statute of Limitations Begins to Run, with Respect to Private Claims for Damages for Violation of the Antitrust Laws, Against Each Overt Act as It Occurs, but Even if Its Running Were Deferred Until the Last Overt Act Causing Damage, the Petitioner's Case Would Still Be Barred.

Petitioner complains of the court below that it held that the statute of limitations begins to run, with respect to a private suit for damages under the Sherman Act, against each overt act as it occurs and not from the date of the last overt act.

The Court of Appeals was entirely correct, but here again the question is academic, in this case. As petitioner conceded (see pp. 2, 3, supra), it was out of business by January, 1929, and no overt acts occurred after that date that caused it any damage. Thus the statute of limitations ran long before suit was brought, whether it started to run against each overt act as it occurred or only when the last act occurred.

Consequently, it suffices to note briefly that the cases cited by petitioner are not in point because they are criminal cases. So long as there is a conspiracy continuing to a time within the period of limitations, there is a punishable crime, a wrong against the public which the government may vindicate, whether or not any specific person is injured. But a treble damage suit is not brought to vindicate the law; the gravamen of such an action is not the wrong to the public but the damage suffered by the plaintiff which can only flow from overt acts, and

although the overt acts acquire the taint of illegality because of the conspiracy, the private plaintiff's right to recover is based on the acts done and it is for the damage to him that he recovers. All the authorities without exception have therefore held that the rule applicable to criminal cases has no application in a private civil suit, and that there the continuance of a conspiracy has no bearing on the running of the statute. *Foster & Kleiser Co. v. Special Site Sign Co.*, supra; *Bluefields S. S. Co. v. United Fruit Co.* 243 Fed. 1; *Momand v. Universal Film Exchange*, 43 F. Supp. 996, 1006; *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885, 888, 890 (4 Cir.); *Strout v. United Shoe Machinery Co.*, 208 Fed. 646; *Sidney Morris & Co. v. National Association of Stationers*, 40 F.2d 620 (7 Cir.); *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, 15 F.2d 678, 680 (4 Cir.); *Midwest Theatres Co. v. Cooperative Theatres*, 43 F. Supp. 216, 220; *Leonard v. Socony Vacuum Oil Co.*, 42 F. Supp. 369, 370; *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8 Cir.), cer. den. 314 U.S. 644; *Twin Ports Oil Co. v. Pure Oil Co.*, 46 F. Supp. 149, 152.

CONCLUSION

Contrary to the petitioner's assertion (p. 10), there is no "current confusion" in the antitrust decisions on the law applicable to this suit. That law is settled and clear and the authorities unanimous. By incantations about the public interest petitioner seeks to create new and nebulous law, and it does so in a case where, on the facts, petitioner is barred by limitations no matter what rule of law were to be created, unless it be a rule that suits under the antitrust laws are wholly immune from any rule of limitations whatever. What was said by this Court in *Campbell v. Haverhill*, 155 U.S. 610, cited by this Court in the *Chattanooga* case, supra, and cited again so recently as *Cope v. Anderson*, 331 U.S. 461, is as applicable here as there:

> "But why should the plaintiff * * * be entitled to a privilege denied to plaintiffs in other actions of tort? * * *

why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defences to which the defendant would otherwise be entitled?

"Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever, a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions."

The Sherman Act, of course, reflects public policy, but Congress has provided criminal and civil remedies by the government to vindicate the public interest, and in permitting the treble damage action it does so for the purpose of redressing private injury. *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 750. The treble damage claimant is entitled to no special dispensations. Statutes of limitations are "established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary" (*Kavanagh v. Noble*, 332 U.S. 535) just as much in the case of the treble damage claimant as in any other case.

We respectfully submit that the petition for writ of certiorari should be denied.

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